IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC94977

BLAEC JAMES LAMMERS,

Defendant/Appellant,

vs.

STATE OF MISSOURI,

Plaintiff/Respondent

APPELLANT'S SUBSTITUTE BRIEF

APPEAL FROM THE CIRCUIT COURT OF POLK COUNTY, MISSOURI

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JURISDICTIONAL STATEMENT

This is an appeal from Appellant's Judgment and Conviction of Assault in the First Degree and Armed Criminal Action following a Bench Trial in the Polk County Circuit Court.

Appellant Blaec James Lammers appealed said conviction and the Missouri Court of Appeals for the Southern District, in a 2-1 decision, Chief Judge William Francis dissenting, affirmed the conviction by the Honorable Judge William Roberts, Senior Judge.

Appellant's Application for Transfer filed in this Honorable Court was sustained on June 30, 2015. Accordingly, this Honorable Court has jurisdiction over the appeal pursuant to the Order sustaining Appellant's Application for Transfer after the Opinion in the Court of Appeals.

STATEMENT OF FACTS

The felony information charged Mr. Lammers in three counts. Count I charged the Class B felony of Assault in the first degree on or about November 15, 2012. (L.F.1); Count II charged the Class C felony of Making a Terroristic Threat on the same date of November 15, 2012. (L.F.2); and, Count III charged the felony of Armed Criminal Action on November 15, 2012, by committing the assault in Count I with the use of a deadly weapon. (L.F.2).

A Jury Trial Waiver was filed on October 17, 2013 (L.F.33) and the case was tried before the Honorable William Roberts, Senior Judge, on January 30-31, 2014.

Defendant filed a Motion to Suppress his custodial statements to law enforcement officers pursuant to his interrogation on November 15, 2012 (L.F. 25-28). Said Motion along with Supporting Suggestions was filed on December 20, 2013. The State did not file any Responsive Motion in opposition.

A Motion for Mental Evaluation of the Defendant was filed by the State on November 19, 2012 (L.F. 18) only four days after he was arrested. The Honorable John Porter, Associate Circuit Judge for Polk County issued a detailed Order for Mental Examination of the Defendant on November 20, 2012. (L.F. 19-21). A second Order for Mental Examination was issued by Judge Porter on January 2, 2013. (L.F. 22-23). The Honorable William Roberts, on January 30, 2014, entered his Finding of Competency to Stand Trial. (L.F. 24).

The testimonial hearing on Defendant's Motion to Suppress the custodial statements taken pursuant to his interrogation on November 15, 2012, was taken up on January 30, 2014, immediately prior to the trial itself. (Tr. 4, l. 14-Tr. 67, l. 3).

Testimony by the state's witnesses clearly stated that the defendant lawfully purchased two firearms at the Wal-Mart in Bolivar. He purchased a .22 long gun on November 12, 2012 (Tr. 98-99) which according to the defendant's custodial statement was merely to be used for target practice. The sale to defendant was made after the clerk's completion of the mandated FBI computerized authorization process validated the sale to be lawful (Tr. 98-99). He purchased a hunting type rifle on November 13, 2012, at Wal-Mart (Tr. 92-93). The same computerized FBI check as was done on the precious sale was conducted (Tr. 93-94) and the results again validated said sale to defendant to be totally lawful (Tr. 93-94; Tr. 97).

The defendant told Detective Ross in his custodial statement that he and his girlfriend went over to a friends farm in the late afternoon for purposes of shooting at pop cans. This was verified by state's witness Ethan Mason who also participated in the target practice (Tr. 103-104). Mr. Mason shot about 50 rounds and the defendant shot about one-half that many (Tr. 104; Tr. 106). Mr. Mason indicated that the .223 rifle was a hunting rifle used for large game (Tr. 104). Mr. Mason also testified to the fact that the defendant indicated after they had shot at the pop cans, that he was going to take the guns and leave them in Mr. Dybdall's possession. Mr. Dybdall was the defendant's girlfriend's father.

Indeed, on November 14, 2012, the defendant did take both guns and left them with Mr. Dybdall on November 14, 2012, with full knowledge at the time that Mr. Dybdall would be contacting the Sheriff's Office about the guns (Tr. 111, l. 25-Tr. 112, l. 5). The defendant on November 14, 2012, also called his mother to tell her he had purchased the 2 firearms (Tr. 12). The defendant clearly understood that law enforcement would know he left the two firearms and with that understanding, he left them in Mr. Dybdall's possession (Tr. 111-112).

Mike Sly, a Bolivar policeman, contacted the defendant and his girlfriend at Sonic Drive In on November 15, 2012 (Tr. 28). The contact was to be nothing more than a check on the defendant's well-being (Tr. 28). The officer told the defendant his mother was worried about whether he was taking his medication (Tr. 29). The defendant said he was taking his prescribed medication and acknowledged purchasing the guns for hunting, but he didn't have a license (Tr. 29).

Officer Sly indicated that Detective Ross came to Sonic and just told the defendant to come to the police station to talk to them (Tr. 31, l. 9-10). The defendant was in a car with his girlfriend but was taken to the station in a police car by Detective Ross (Tr. 31). The defendant was not told he did not have to go (Tr. 31) and was not offered the opportunity to have his girlfriend drive him there so that he would have had transportation at the station.

Dustin Ross, who was a Bolivar detective at the time he took the defendant to the police station to interrogate him in a room with audio-video equipment to capture the interrogation, was involuntarily fired two months after this incident (Tr. 44). Mr. Ross

suggested his purpose was only an onsite wellness check (Tr. 45) but acknowledged that it was already his plan to take the defendant to the police station when he left to go to Sonic where Officer Sly was speaking with the defendant (Tr. 46).

The defendant was not told at Sonic that he was free to go; did not have to speak with the officer; that he did not have to go to the station with the officer or in fact, to go at all. Mr. Lammers was not given the opportunity to come to the station in the personal car he was in should he chose to voluntarily go to the police station nor was his girlfriend told where they were taking the defendant or that she could follow them to the station to be available with transportation for the defendant.

Mr. Ross attempted to justify his failure to tell the defendant he didn't have to go with him and that he was free to leave simply because he never asked (Tr. 52). Mr. Ross also failed to check with the defendant's mother to get his psychiatric medication brought there despite his alleged knowledge the medications had not been taken (Tr. 55). The defendant was on two prescribed depression medications (Tr. 7); had been hospitalized numerous times in mental hospitals (Tr. 8); had been hospitalized for over two continuous months in the Lakeland Psychiatric facility in 2009-2010; had a confirmed Social Security psychiatric disability (Tr. 23); had difficulty in verbalizing his own thoughts (Tr. 19); had difficulty in understanding statements from others, hearing only bits and pieces (Tr. 19) and, was afraid to ask questions when he didn't understand (Tr. 19).

Mr. Ross separated the defendant from his girlfriend; took him to the police station in a police vehicle; kept him at the station alone, without his transportation; did not

inform the defendant's mother where he was nor attempt to get his prescribed psychiatric medication from his mother. The defendant was placed in a small interrogation room in total isolation from friends or family. The defendant did not know why he was there.

The defendant's Motion to Suppress was denied (Tr. 78, l. 16-22) based solely on a Fifth Amendment analysis in contravention of the holdings in *Brown v. Illinois*, 442 U.S. 590 (1975) and *Dunaway v. N.Y.*, 442 U.S. 200 (1979).

The defendant's Motion for a directed judgment of acquittal on the terroristic threat charge in Count II was sustained at the close of the state's opening statement (Tr. 87, l. 24-25).

The defendant was interrogated for a lengthy period of time by a tag team of officers. Quite frequently more than one officer was questioning Mr. Lammers. Mr. Lammers never told the officers that he bought the firearms with the intent to harm any person. In fact, Detective Ross acknowledged in his testimony during the Motion to Suppress that it was only when the defendant was target practicing right after he got the guns, that he thought he should not have guns for fear of what he might do. He immediately made arrangements to place the guns in possession and control of his girlfriend's father for fear that he might wrongfully use them if he were off of his psychiatric prescriptions. He then called his mother and told her he had purchased the guns. (Tr. 60; Tr. 60, l. 16-18; Tr. 60, l. 19-21; Tr. 61, l. 5-7; Tr. 61, l. 8-12).

The Court overruled Defendant's Motions for Judgment of Acquittal at the close of the State's case and at the close of the case as a whole. The judge found the Defendant

guilty on Counts I and III and at sentencing imposed concurrent terms of 15 years on each count (L.F. 34).

This case was appealed to the Southern District Court of Appeals and in a 2-1 decision with Chief Judge William Francis dissenting and filing his opinion that the conviction should be reversed. Appellant's conviction was affirmed. A timely Application for Transfer was made in this Honorable Court. Said Application for Transfer was sustained and the matter is properly here for decision on the Appeal.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN OVERRULING BOTH OF DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON COUNTS I AND III AND IN FINDING THE DEFENDANT GUILTY ON BOTH COUNTS FOR REASON THAT THERE WAS A TOTAL LACK OF EVIDENCE TO JUSTIFY A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY FOR EITHER CHARGE BEYOND A REASONABLE DOUBT

State ex rel. Verweire, 211 S.W.3d 89 (Mo. banc 2007)

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POINTS RELIED ON

II

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS AND IN ADMITTING AS EVIDENCE DEFENDANT'S CUSTODIAL STATEMENTS TAKEN IN AN INTERROGATION CELL AT THE POLICE STATION FOR REASON THAT SAID STATEMENTS WERE TAINTED BY HIS UNLAWFUL, DE FACTO ARREST AND PROLONGED DETENTION AND FOR FURTHER REASON THAT SAID STATEMENTS WERE A PRODUCT OF IMPROPER, INCOMPLETE, AND INCOMPREHENSIBLE MIRANDA WARNINGS IN VIOLATION OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS

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ARGUMENT
I

THE TRIAL COURT ERRED IN OVERRULING BOTH OF DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON COUNTS I AND III AND IN FINDING THE DEFENDANT GUILTY ON BOTH COUNTS FOR REASON THAT THERE WAS A TOTAL LACK OF EVIDENCE TO JUSTIFY A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY FOR EITHER CHARGE BEYOND A REASONABLE DOUBT

Standard of Review:

The standard of review regarding sufficiency of evidence requires a determination that a rational finder of fact could find guilt beyond a reasonable doubt on the charge of conviction. *State v. Dublo*, 243 S.W.3d 407 (Mo. App. 2007).

The defendant was convicted on Count I of Assault in the First Degree in violation of Section 565.050, R.S.Mo. The information charged an attempt to kill or cause serious physical injury to unknown persons at the Bolivar, Wal-Mart store on or about November 15, 2012.

The state's evidence, given its most favorable meaning, shows that the Defendant lawfully purchased two firearms at Wal-Mart, one on November 12, 2012, and the other on November 13, 2012.

Jeff Murray, the Sporting Goods Manager at Wal-Mart (Tr. 92), sold a rifle to the defendant on November 13, 2012 (Tr. 93). A computerized FBI check was conducted to

validate a lawful sale (Tr. 93-94). The check justified a lawful sale to Blaec Lammers, the defendant in this case (Tr. 93-94; Tr. 97). Mr. Murray did not know for certain if ammunition was purchased.

On November 12, 2012, Annette Lakey, a Wal-Mart employee sold the defendant a .22 long rifle (Tr. 98-99). The authorization process through the FBI was conducted and validated the lawful sale to Blaec Lammer (Tr. 99).

Ethan Mason, a state's witness testified that he first met the defendant in late October, or early November, 2012 (Tr. 101, l. 13-18). Mr. Mason identified States Exhibit 1 and 2, as two rifles that had been left by the defendant at Ethan's apartment that he shared with a cousin of the defendant's girlfriend (Tr. 102). Ethan and the defendant, on one occasion only, fired the weapons at targets (Tr. 106). The defendant knew how to shoot a rifle but Ethan did show him the proper way to load it (Tr. 103). Ethan, a hunter himself, indicated that the .223 is a commonly used hunting rifle, usually for larger game (Tr. 104). Ethan knew the two guns were going to be taken to Mr. Dybdall and indeed the two firearms were taken to Mr. Dybdall on November 14, 2012, after his daughter had texted him about the defendant leaving the firearms with him (Tr. 110).

Mr. Dybdall told the defendant that if the firearms were left there that he would be telling the Sheriff and having the guns checked to see if they were stolen (Tr. 111, l. 25-112, l. 5). The defendant clearly understood that law enforcement would know he left the two rifles there and with that understanding he left them (Tr. 111-112). Mr. Dybdall also told the defendant that if and when he might want to get the guns, he would have to come and see him and make the request in person (Tr. 112).

Mr. Dybdall called the Defendant's mother on the same day he got the guns and told her (Tr. 113). Ms. Lammers said she would be contacting officers (Tr. 114) and indeed she did on the next day, November 15, 2012 (Tr. 14).

Patricia Lammers, the defendant's mother (Tr. 6), received a call from Mr. Dybdall, the father of the defendant's girlfriend on November 14, 2012. He told her that he was keeping two guns left with him that day by the defendant. (Tr. 12). The defendant also told Ms. Lammers that he had purchased the guns (Tr. 12). Ms. Lammers, after being told about the guns by both Mr. Dybdall and the defendant, found a receipt for the purchase of a weapon that morning at Wal-Mart (Tr. 10).

Ms. Lammers told Mr. Dybdall to keep the guns until her husband came to get them (Tr. 13). Ms. Lammers went to the police station the following day, which was November 15, 2012 (Tr. 14). She told the police that the defendant had left the two guns with Mr. Dybdall (Tr. 14). Ms. Lammers told them she was not afraid the defendant would hurt another person but was afraid he might hurt himself based on the fact he had cut himself in the past (Tr. 24). She assured the police that her son could not get the guns back (Tr. 23). She made it clear to the police on November 15, 2012, that her son did not have the weapons and that Mr. Dybdall had the weapons and would not give them back to the defendant (Tr. 22).

A person commits the crime of assault in the first degree if he attempts to kill…or attempts to cause serious physical injury to another person, 565.050, R.S.Mo. The statute requires that a person charged with first degree assault must have acted knowingly and willingly. *State v. Thomas*, 972 S.W.2d 309, 313 (Mo. App. 1998). Where the assault

charge is based on an attempt to kill, as the instant case, courts have applied a heightened mental state, requiring evidence that the defendant acted purposefully. *State v. Whalen*, 49 S.W.3d 181, 186 (Mo. banc 2001). Thus, a conviction for first degree assault by 'attempt to kill' requires proof of a very specific intent on the part of the actor to accomplish that objective. Indeed there must be evidence of the defendant's specific intent to cause the victim's death. *State v. Gonzales*, 652 S.W.2d 719, 722-23 (Mo. App. 1983) cited in *England v. State*, 85 S.W.3d 103 (Mo. App. 2002).

In the instant case, the defendant has been convicted of assault in the first degree without any injury to an alleged victim. In such cases, a conviction of first degree assault requires proof of a very specific intent on the part of the actor to kill or cause serious physical injury. *State v. Dublo*, 243 S.W.3d 407 (Mo. App. 2007). Indeed, defendant Blaec Lammers not only did not cause physical injury of any kind, he never even placed any person in danger of being injured or even threatened with injury of any sort.

The theory advanced by the state to support the charge and conviction of defendant Blaec Lammers for assault in the first degree is premised entirely upon the assumption Mr. Lammer's lawful purchase of two firearms, known to be used in hunting, was done so with a specific intent to kill or seriously injure unknown possible victims at Wal-Mart. It is the state's position that proof of intent comes solely from custodial statements by Mr. Lammers on November 15, 2012. Indeed, they do so by desperate necessity because there is absolutely no evidence from a witness or by any act by the defendant that gives any indication or suggestion of such intent, much less the necessary proof beyond a reasonable doubt.

Defendant Lammer's tag term custodial interrogation by several officers, who often times questioned him two at a time did not reveal any evidence that the defendant had any intent to purchase the two firearms on November 12 & 13, 2012, with the intent to kill or injure any person. Mr. Ross acknowledged in his trial testimony that they had no evidence that the defendant had any thoughts of harming anyone when he purchased the two firearms (Tr. 61, l. 5-7). Indeed, Officer Ross admitted that the defendant never said his intent in purchasing the firearms was for the purpose of harming any person (Tr. 60). Officer Ross finally admitted that any thoughts of the defendant about possible harm to others came after the purchase (Tr. 61, l. 8-12). The thought that the defendant had after purchasing the guns when he was practice shooting caused the defendant to be afraid of what he might do and immediately caused him to give the guns to his girlfriend's father to avoid the possibility of any harm (Tr. 60, l. 16-18; Tr. 61, l. 8-12). The defendant's thoughts of what he could do came about with his practice shooting. Officer went so far as to say that he verified the defendant's fear caused him to give possession to his girlfriend's father (Tr. 60, l. 19-21).

State ex rel. Verweire, 211 S.W.3d 89 (Mo. banc 2007) and *State v. Dublo*, 243 S.W.3d 407 (Mo. App. 2007) both firmly support Defendant's argument of error by the Court in denying defendant's Judgment of Acquittal Motions and in finding the defendant guilty of assault in the first degree. The Courts in these two cases found, though faced with facts of imminent danger and threat a lack of evidence to prove the specific intent required by the statute to convict for first degree assault.

The defendant in *Verweire*, supra at p. 93, grabbed the victim, held a gun to his head and chest while stating he was going to blow his head off, and then withdrew. This Honorable Court held that this was not sufficient evidence to support a conviction of first degree assault. In *Dublo*, supra. at p. 410, the Western District followed *Verweire* and found evidence insufficient for first degree assault where the defendant let the victim go without harm after holding a knife to his neck and saying he was going to kill him.

The facts in the instant case are far less egregious than *Verweire* and *Dublo*. Defendant Lammer's never placed any person in jeopardy of death or serious physical injury. Mr. Lammers lawfully purchased two firearms but there was no evidence they were purchased for any unlawful purpose. Indeed, it was during the time he was target practicing with his friend that he became fearful of the thoughts about harming people at Wal-Mart came up. He became fearful that he might act on such thoughts and took actions on his own to place his firearms in the hands of his girlfriend's father in order to avoid actions directed at shooting anybody.

Defendant Lammers did not exhibit the necessary firm and heightened intent to kill required to support a conviction for first degree assault. He was off his medications and when confronted with the thoughts, he informed his mother that he had purchased the two firearms and made arrangements to give the two guns to Mr. Dybdall knowing at the time Dybdall was going to contact law enforcement about the guns.

Defendant Lammer's took affirmative action to prevent the "possibility" of harm thereby clearly exhibiting a lack of firm intent to committing first degree assault.

Verweire, and *Dublo* would mandate reversal. Defendant Lammers recognized the possibility that he might act before he in fact did so.

Indeed, when Lammers was first contacted by the Bolivar Police, he had informed his mother of having purchased the two firearms and he had placed the firearms in Mr. Dybdall's possession to avoid possible misuse of the guns. The police knew Mr. Lammers had given possession to Mr. Dybdall and had no access to them by his own actions.

Defendant further argues that the Court erroneously admitted and used his extrajudicial statements to Detective Ross to try to find substantial evidence to sustain his conviction of first degree assault and armed criminal action without any independent proof, direct or circumstantial, of the essential elements of the *corpus delecti*. Counsel argued this point in the Motion in Limine (L.F.29) which was denied by the Court.

The *corpus delecti* cannot be presumed and must be proved by legal evidence sufficient to show that the specific crime charged was committed by someone. *State v. Summers*, 362 S.W.2d 537, 542 (Mo. 1962). There must be evidence independent of the defendant's statement to show a crime was committed or else the defendant's statements are not admissible. *City of St. Louis v. Watters*, 289 S.W.2d 444 (Mo. App. 1956).

Indeed, this Honorable Court in *State v. Charity*, 587 S.W.2d 350 (Mo. App. 1979) clearly held that independent proof of the essential elements of *corpus delecti* must be proved by evidence independent of the extra judicial statement admission or confession. The *Charity*, supra., decision held said statements were both inadmissible and insufficient to sustain a conviction.

In the instant case, the only independent evidence presented was that the defendant lawfully bought two weapons; practice shot them with a friend on one occasion; left them with his girlfriend's father despite knowing that the father was going to notify the police; and called his mother telling her he had bought the weapons. This independent evidence is not corroborative or independent proof of the *corpus delecti* or in fact, any element of the offenses charged.

Indeed, the defendant's statements were clearly not admissible and the evidence with or without them is not sufficient to sustain a verdict beyond a reasonable doubt.

The record in this case is devoid of any evidence to support any firm intent to kill or cause serious injury. There was no substantial step to carry out any intent to harm anyone. The evidence mandates a reversal of defendant's conviction on Count I and his discharge.

ARMED CRIMINAL ACTION

A conviction of the Armed Criminal Action requires a valid, lawful conviction of the First Degree Assault. It is based upon the same facts that fail to support the charge in Count I and must likewise be reversed as was the case in *State v. Dublo*, supra.

ARGUMENT
II

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS AND IN ADMITTING AS EVIDENCE DEFENDANT'S CUSTODIAL STATEMENTS TAKEN IN AN INTERROGATION CELL AT THE POLICE STATION FOR REASON THAT SAID STATEMENTS WERE TAINTED BY HIS UNLAWFUL, DE FACTO ARREST AND PROLONGED DETENTION AND FOR FURTHER REASON THAT SAID STATEMENTS WERE A PRODUCT OF IMPROPER, INCOMPLETE, AND INCOMPREHENSIBLE MIRANDA WARNINGS IN VIOLATION OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS

Standard of Review:

The standard of review in considering a trial Court's denial of a Motion to Suppress is de novo with regard to the legal conclusions concerning Constitutional compliance and clear error as to factual findings. *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996).

Defendant filed a Motion to Suppress defendant's custodial statements taken pursuant to an interrogation by Officer Ross and other officers who came in and out of the interrogation and much as a tag team randomly joined in the questioning of the defendant.

Defendant's mother had gone to the Bolivar police station on November 15, 2014 and told the officers that the defendant had purchased two firearms from Wal-Mart. The basis for her knowledge was a phone call from the defendant; a phone call from Mr.

Dybdall, the father of her son's girlfriend; and, a receipt found when she was doing her son's laundry, all on November 14, 2012 (Tr. 12; Tr. 10).

Ms. Lammers told the police that her son had told her he bought the two guns; that he did not have the weapons (Tr. 22); and that he gave the weapons to Mr. Dybdall who was keeping them and not giving them back to Blaec (Tr. 22). She assured them that Blaec was not getting the guns back (Tr. 23).

Ms. Lammers told the police that she was fearful that her son might hurt himself based on things like cutting himself in the past (Tr. 24). She told them that she had no reason to fear he would hurt someone else (Tr. 24). She simply was trying to make sure the defendant was okay himself.

The defendant, on the same date of November 15, 2012, was located at a Sonic drive in restaurant by Officer Sly, a city police man (Tr. 28). The defendant and his girlfriend were in her car parked in one of the slots for ordering food to be eaten at the drive in (Tr. 28). The basis for the contact was for nothing other than an on-site well-being check to see if he seemed okay (Tr. 28-29). Officer Sly told the defendant his mother was worried (Tr. 29); found out the defendant was taking his medication (Tr. 29); and was told by the defendant he had purchased the guns (Tr. 29) which Ms. Lammers had already told police were not in her son's possession (Tr. 22) but were in possession of Mr. Dybdall who was keeping them (Tr. 22). Just as Officer Sly's "well-being" check had concluded then city Detective Ross showed up (Tr. 29).

Detective Ross didn't ask any well-being questions about whether defendant bought guns or was taking his medication (Tr. 46-47). Officer Sly indicated that Detective Ross

simply told the defendant to come down to the police station to talk with them (Tr. 31, l. 9-10). The defendant was directed into Detective Ross's police vehicle to be taken to the police station (Tr. 31). According to Officer Sly the defendant was never informed he didn't have to go nor was he allowed to go in the car he was in (Tr. 31). There was no indication that the defendant's girlfriend was told where they were going or for what nor was she advised that she could follow them and wait for the defendant.

Detective Ross did not have a Well-Being Check in mind. He acknowledged in testimony that had a plan to take the defendant to the Police Station already in place when he left to go to where the defendant was being talked to by Officer Sly (Tr. 46).

Detective Ross never gave the defendant the affirmative opportunity to come to the police station with his girlfriend in the car they were in (Tr. 48). Detective Ross intentionally did not tell the defendant he didn't have to go with him or that he was free to go on his own way (Tr. 52). Defendant would note at this point that Detective Ross was "involuntarily terminated" (fired) from the police force shortly after this incident with the defendant (Tr. 44) and thus did not continue on with the investigation of the defendant.

The defendant was not given the opportunity to call either of his parents; his mother was not contacted with reference to them taking him to the police station for interrogation; his mother was not contacted with regard to his needed prescribed psychiatric medication so that she could get them to him; and, the defendant was immediately placed in a small interrogation cell equipped with audio-video equipment for the recording of any statements they could secure.

The defendant and his psychiatric issues were known to the police. His past was filled with numerous placements in psychiatric hospitals (Tr. 8). There were talks with the defendant and ongoing attempts around the time of this occurrence to get him placed in a residential placement facility (Tr. 9).

Interrogation began very shortly after he was placed in the small interrogation cell upon arrival at the police station. The defendant had no outside contact with an attorney, a friend, his parents, or in fact any non-law enforcement person from when he was placed in the police car, taken to the station, and interrogated for a substantial period of time.

The defendant said he didn't know why he was there. He told Detective Ross he was scared on at least one occasion. The alleged Miranda warnings given to him consisted of incomplete warnings given in a speedy, incomprehensible mumbling that spewed out as the officer was walking into the interrogation cell when the defendant had his head down on the table.

The defendant was never given a written Miranda form to read over and sign. The defendant was not told why he was being questioned, why he was at the station, or what it was they thought he may have done. The defendant was never informed of his right to stop answering questions at any time nor was he advised that he could refuse to answer the questions. The interrogating officer knew the defendant had missed his depression medication on both Monday and Tuesday and yet there was no written Miranda waivers to read or any attempt to contact his mother and secure the medication.

Detective Ross, according to his own testimony had already planned to take the defendant to the police station for "obvious investigative purposes" prior to his arrival at

the Sonic restaurant ostensibly for an on-site wellness check that was never going to occur (Tr. 46). Investigative detention in an interrogation cell at the police station came smoothly on the heels of the defendant being taken from his friend and his own transportation in a police vehicle to the station. Tag team interrogation immediately began regarding why the police knew he was concealing his purpose for getting the two guns. The defendant said he was scared and the deluge of questions continued, still without the defendant being told or knowing he was free to leave or stop answering questions. Indeed, as stated by his mother, he has a hard time verbalizing his thoughts; a hard time understanding statements from others; hears only bits and pieces of statements; and, is afraid to ask questions if he doesn't understand (Tr. 19).

Arrests and detentions for investigatory purposes on less than probable cause have long been disapproved by the Courts. The Supreme Court in both *Brown v. Illinois*, 422 U.S. 590 (1975) and *Davis v. Mississippi*, 394 U.S. 721 (1969) reflected clear conclusions that detention for custodial interrogation, regardless of its label, intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests.

Fifth Amendment rights analysis in the instant case clearly shows that (a) the officer did not read Miranda rights to the defendant; (b) the rights given were materially incomplete; (c) There were no written Miranda rights shown; (d) The defendant was never advised he had the right to refuse to answer or stop at any time; (e) The speedy and in most respects incomprehensible listing of rights began as the officer first entered the room, prior to sitting down, and in fact prior to even addressing the defendant or telling

him why he was there or what he was to be talked to about. In addition, the officer knew the defendant to have a psychiatric history and was not on his medication at that time.

It is uncontested that the defendant was taken to the police station, placed in an interrogation cell, questioned for a substantial time, and detained without advice that he was free to leave all without any probable cause to arrest, detain, or custodially interrogate him. The state argues that the defendant was not formally arrested but the clear facts show that the defendant's custodial detention was unlawful even if the existence of a de facto arrest is ignored. This was not a brief roadside detention but was rather the removal of the defendant to the interrogation cell at the police station with a prolonged tag team custodial interrogation being audio-video recorded.

It is uncontested that was no probable cause to arrest or custodially detain the defendant based upon any alleged violation of the law. There were no facts then existing to even suggest the defendant to have done anything illegal.

In the instant case, suppression of the custodial statements would be mandated even if proper and complete Miranda warnings had been given. The prolonged unlawful detention, a/k/a de facto arrest demand analysis under both the Fourth and Fifth Amendment to determine admissibility versus suppression.

The law is clear that while a confession after "proper" Miranda warnings may be deemed voluntary for Fifth Amendment purposes, this type voluntariness is merely a "threshold requirement" for the necessary Fourth Amendment analysis *Brown v. Illinois*, supra., at 604. Fourth Amendment analysis dictates that the taint of the unlawful arrest, de facto arrest, or unlawful, prolonged custodial interrogation has been attenuated. The

burden of proving the taint has been attenuated to establish admissibility rests with the prosecution. *Brown v. Illinois*, supra, at 603-604. Indeed, Missouri by statute mandates proof by a preponderance of evidence by the state that a Motion to Suppress be denied.

The exclusionary rule…when used to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth Amendment, thus Miranda warnings by themselves do not attenuate the taint of unconstitutional arrest *Brown v. Illinois*, supra., at 601. If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, the exclusionary rule would be substantially diluted…Arrests made without warrant or without probable cause, for questioning or investigation would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Brown v. Illinois*, supra, at 602.

Factors to be considered in showing a causal connection between the illegal arrest and the confession include, (a) temporal proximity of the arrest and the confession; and the presence of intervening circumstances…and the burden of showing admissibility rests, of course on the prosecution. *Dunaway v. New York*, supra. At 207 and *Brown v. Illinois*, supra., at 603-604.

In the instant case, the temporal proximity of the arrest and the beginning of the confession is a minute or less. There were no intervening circumstances at all that would have in any manner attenuated the taint and effect of the illegal arrest on the statements. There are no facts upon which the state can meet its burden of proof as to attenuation.

Neither the state nor the Court gave any consideration to the necessity of attenuating the custodial taint on the admissibility of the custodial statements. The state not only did not meet its burden of proof by a preponderance of evidence as mandated by both statute and case law, it totally confined its position to improper and incomplete 5th Amendment analysis. The Court merely denied the Motion to Suppress based solely on voluntariness from the giving of the Miranda rights in contravention of both *Brown*, supra., and *Dunaway*, supra. Suppression is clearly mandated (Tr. 78, l. 16-22).

CONCLUSION

For the foregoing reasons relating to errors by the trial court in denying defendant's Motion to Suppress, overruling defendant's Directed Judgment of Acquittal Motions, and finding Defendant guilty on Counts I and III without sufficient evidence to prove guilt beyond a reasonable doubt, Defendant's convictions on both counts should be reversed and he be discharged.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 (c)

The undersigned counsel for Appellant certifies that the foregoing brief complies with the limitations contained in Rule 84.06 (b) and that the brief contains 6,608 words and was prepared in Microsoft Word and converted to a pdf file using Primo PDF. The undersigned counsel further certifies that the substitute brief and appendix have been scanned for viruses and were found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 30th day of July, 2015, the foregoing document was electronically filed with the Clerk of the Court using the electronic filing system which sent notification of such filing to all counsel of record.

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